# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 23, 2003 |
| v | No. 242184<br>Wayne Circuit Court |
| ELBERT BONNER,<br><br>Defendant-Appellant. | LC No. 01-003493 |

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twenty to thirty-five years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction, with the sentences to run consecutively. We affirm.

I.

On February 26, 1997, Jeffery Phillips was shot numerous times and killed at the corner of Peter Hunt and Holcomb Street in Detroit, Michigan. Jamel Pennington,[1] Alexandria Neeley (Pennington's daughter), and Phillip Neeley, testified that that they saw defendant pointing a gun at Jeffery Phillips. Pennington and Phillip Neeley testified that they witnessed defendant fire the gun at Jeffery Phillips several times.

II.

Defendant's first issue on appeal is that his Sixth Amendment right to a public trial was violated where the trial court cleared the courtroom for the testimony of Alexandria Neeley and because defendant was prejudiced by the implication that there was a threat. We disagree.

[1] Pennington referred to Jeffery Phillips as her brother-in-law, but in actuality she was not even married to his half brother, Dwayne Neeley, whom she lived with and who was the father of Alexandria Neeley.

Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Antkoviak*, 242 Mich App 424, 430; 619 NW2d 18 (2000). Defendant argues that the clearing of the courtroom prejudiced him, but a criminal defendant is not required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee of the Sixth Amendment. See *Waller v Georgia*, 467 US 39, 49-50; 104 S Ct 2210; 81 L Ed 2d 31 (1984). In *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994), our Supreme Court indicated that the denial of the right to a public trial may properly be considered constitutional error warranting automatic reversal.

The federal and state constitution guarantees criminal defendants the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). In *Waller, supra*, the United States Supreme Court indicated the following with regard to the public trial requirement:

> """The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . ."" [*Gannett Co v DePasquale*, 443 US 368, 380 (1979)] (quoting *In re Oliver*, 333 US 257, 270, n 25 (1948), in turn quoting 1 T Cooley, Constitutional Limitations 647 (8th ed 1927)).
>
> In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. See *In re Oliver, supra*, at 270, n 24; *Douglas v Wainwright*, 714 F2d 1532, 1541 (CA11 1983), cert pending, Nos. 83-817, 83-995; *United States ex rel Bennett v Rundle*, 419 F2d 599, 606 (CA3 1969). [Internal footnote omitted.]

Although the right to an open trial is not absolute, that right rarely gives way to other interests. *Waller, supra* at 45. "'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Waller, supra* at 45, quoting *Press-Enterprise Co v Superior Court of California, Riverside County*, 464 US 501; 104 S Ct 819; 78 L Ed 2d 629 (1984). A compelling interest needs to be shown for a total closure, and a substantial interest needs to be shown for a partial closure. *Kline, supra* at 169.

The requirements for a total closure are explained in *Kline, supra* at 169, as follows:

> The requirements for the total closure of a trial were set forth by the Supreme Court in *Waller, supra*: (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. [*Id*., citing *Waller, supra* at 48 (quoting *Press-Enterprise Co, supra* at 501).]

Then, in *Kline*, *supra* at 169-170, this Court discussed a partial closure compared to a total disclosure as follows:

> *Waller* addressed total closure of a suppression hearing and does not necessarily govern partial closures.[2] See, e.g., *United States v Sherlock*, 865 F2d 1069, 1076 (CA 9, 1986), *Jones v Henderson*, 809 F2d 946, 951 (CA 2, 1987). Because the impact of a partial closure does not reach the level of total closure, only a substantial, rather than a compelling reason for the closure is necessary. *Sherlock*, 865 F2d 1077; *Nieto v Sullivan*, 879 F2d 743, 753 (CA 10, 1989), cert den 493 US 957; 110 S Ct 373; 107 L Ed 2d 359 (1989); *Douglas v Wainwright*, 714 F2d 1532, 1544 (CA 11, 1983). [Footnote in original.]

Initially, the prosecution contended that Alexandria Neeley should not be called as a witness because she was so young and that bringing up the past would be injurious to her mental well being and could also be detrimental to her physical well-being. Subsequently, both the prosecution and defense counsel examined Alexandria Neeley. During this examination, Alexandria Neeley, revealed some information that tended to conflict with some of the testimony of her mother, Pennington. Then, the prosecution asserted that there was a question as to what her influences were. The trial court determined that Alexandria Neeley was a competent witness and further determined that the potential of psychological impact did not outweigh her value as a witness.

On the day Alexandria Neeley was to testify, the prosecution contended that there were allegations of threats towards Alexandria Neeley's mother, Pennington, and threats toward her entire family because they still live in the same community where the murder occurred. The prosecution further contended that, for these reasons, there is concern as to Alexandria Neeley's ability to testify in front of a crowded courtroom and, as such, requested that the courtroom be cleared. The prosecution conceded that if the courtroom was cleared of defendant's family members, that the family members of the witness (who was related to the victim) should also be cleared. But the prosecution did request that a victim advocate be able to remain in the courtroom during Alexandria Neeley's testimony, and the trial court agreed. Defense counsel objected to the clearance of the courtroom, arguing that just because someone comes out and says they are threatened does not entitle one to have the courtroom cleared. In addition, defense counsel stated that if the trial court did not agree with him, he did not object to the presence of the victim advocate, but did not want Alexandria Neeley's mother to be present in the courtroom.

The trial court decided to close the proceedings and made the following findings regarding its decision:

> Well, I don't want to get bogged down in an ancillary hearing on credibility of the threats.

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[2] A partial closure occurs where the public is only partially excluded, such as when family members and/or the press are allowed to remain, *Douglas v Wainwright*, 714 F2d 1532, 1539 (CA 11, 1983), or when the closure order is narrowly tailored to specific needs. *Davis v Reynolds*, 890 F2d 1105, 1109 (CA 10, 1989).

> The way I see it is with the tender years like this, and remembering that this crime is sort of like a neighborhood crime where everybody knows everybody else, the possibility for intimidation, subtle or otherwise is, is high. And that's even without any overt or direct act on the part of the family members of the defendant.
>
> I think to be on the safe side, and it is more likely to preserve the integrity of the child's testimony and her - - and give her some, give her a more comfortable state of mind about appearing as a witness, if there are - - if she's not looking out into the courtroom full of potentially hostile neighbors who live near her or who she knows already, and I think that to be on the safe side I'll grant the People's motion and clear the courtroom during her testimony.
>
> Now, the advocate, if you think, Mr. Wagner, that an advocate is gonna give her some sense of comfort, I don't have a problem with it except I don't want to wait a long time here before we get started.
>
> * * *
>
> Let's clear. Let's have *only the advocate in the courtroom other than the people unrelated to the case,* of course. [Emphasis added.]

The trial court permitted people who were not related to the case to remain in the courtroom during Alexandria Neeley's testimony. Because a portion of the public was allowed to remain in the courtroom, those "unrelated to the case," we conclude that the closure in this case constituted a partial closure. But we note that in *Kline, supra*, this Court indicated that, "[a]lthough we are not confronted with the factual situation, we do not condone the removal of family members from the courtroom in the absence of compelling reasons."[3] *Id*. at 171 n 3.

We must determine whether the trial court had a substantial reason, or in this case we will also look for compelling reason, based on the footnote in *Kline, supra*, for the partial closure. Courts have determined that excluding spectators during a witness's testimony is proper when there is a justifiable purpose, such as to protect witnesses from harassment and physical harm, *United States v Hernandez*, 608 F2d 741, 747-748 (CA 9 1979), and to protect a witness with a fear of testifying in public, *United States v Eisner*, 533 F2d 967, 971 (CA 6 1976). But, even if there is a proper reason for closure, we must also decide whether the closure was narrowly tailored to exclude spectators only to the extent necessary to satisfy the purpose for which it was ordered. *Sherlock, supra* at 1077.

[3] We note that this footnote from *Kline, supra*, appears to be derived from *Sherlock, supra* at 1077, which stated, "[a]lthough we do not condone the removal of family members from the courtroom, we find that the judge's decision, after balancing the rights of the defendants and the protection of a victim witness, satisfied the constitutional requirement that criminal trials remain open to the public."

A panel of this Court has indicated that, "[t]he protection of a witness against intimidation and threats and insuring the integrity of the judicial system and furthering the search for truth are clearly compelling and/or substantial interests." *People v Heard*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket Nos. 221827, 222017, 222018, 222019). [4] Similarly, in the present case, there were allegedly threats, intimidation, and the integrity of the judicial system was insured by the partial closure, which allowed young Alexandria Neeley to testify without outside influences from either side.

In the present case, the closure was based upon a compelling and/or substantial interest and it was no broader than necessary to protect the overriding interests. The closure was very brief, as it was only during the testimony of Alexandria Neeley. The trial court, clearly, considered alternatives to completely closing the courtroom, as the trial court decided to let a victim advocate remain, and allowed those unrelated to the case to remain. Defendant's friends and family were only affected for the duration of Alexandria Neeley's testimony, and were readmitted after she testified. See *Sherlock, supra* at 1077. The trial court did not exclude defendant, nor the press,[5] in expressing that only those related to the case were to be removed for the testimony of Alexandria Neeley. See *Id*. The jury was not informed of the closure, and the transcript of the trial became public record. See *Id*.

Defendant asserts the closure sent a prejudicial message to the jury because the prosecution had earlier stated "I mean this courtroom is not safe." We do not agree, as the statement made by the prosecution was made in a different context, and was not made in connection with the testimony of Alexandria Neeley. There was no unacceptable implication, as the families of Jeffery Phillips and Alexandria Neeley, also, were not allowed in the courtroom.

It is conceivable that other alternatives could have been pursued. However, under the circumstances, where the closure appears narrowly drawn, to the those people who may exert influence over the witness (influences on both sides were removed), we do not think that the partial closure requires reversal or requires a new trial. It is also true that the witness did not testify that she was being threatened in court that day. The trial court's decision to briefly close the courtroom to individuals related to the case did not constitute a denial of a public trial. Closing the courtroom to individuals related to the case at this point not only protected the identified interests, but it also assured that the trial would not become unnecessarily delayed.

Although, this Court has noted that it does not condone the removal of family members absent compelling reasons, seemingly adopting the view of the Ninth Circuit in *Sherlock, supra*, as in *Sherlock*, we find that the trial court's decision "after balancing the rights of the defendants and the protection of a victim witness, satisfied the constitutional requirement that criminal trials

[4] We use this opinion as a guide, and view it as persuasive, because of the limited case law, but note that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1).

[5] There is no record as to whether there was any agent of the press present, but based on the trial court's partial closure agents of the press would have been permitted as long as they were not related to the case.

remain open to the public." *Id*. at 1077. Nevertheless, the reasons articulated for the closure satisfied the rule of *Waller, supra*. Consequently, defendant was not denied his right to a public trial as required by the Sixth Amendment.

III.

Defendant's second issue on appeal is that there is plain error involving improper comment and argument by the prosecution, which requires reversal. We disagree.

Generally, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but the trial court's factual findings are reviewed for clear error. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003); *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id*.

Unpreserved issues regarding prosecutorial misconduct are reviewed for plain error which affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id*. at 721.

A.

Defendant first argues that the prosecution committed misconduct, detracting from defendant's right to a fair trial, by insinuating that defendant had made threats to Jeffery Phillips' family without a proper foundation for introduction of the evidence. This issue is preserved as defendant objected based on the lack of foundation of a threat for this type of testimony.

During the direct examination of Dorothy Phillips, the prosecution asked questions regarding phone calls she claims to have received from defendant two or three days before the murder of Jeffery Phillips. The following colloquial took place between the prosecution and Dorothy Phillips:

*Q*. What made you think it was Mr. Bonner [defendant] who called you?

*A*. Nobody, nobody ever, ever have called my house with a threat like that.

At which time the prosecution objected.

Defendant contends that the prosecution improperly elicited an alleged threat by defendant. Reviewing the context of the prosecutor's questioning, we find that the response was not an invited response to the question, and it appears the prosecutor was only attempting to

establish the identity of the individual who called Dorothy Phillips, i.e. whether that individual was defendant. See *Watson, supra* at 586. The response received from the witness was not even the response that was elicited. As such, upon a de novo review, we find that the prosecution's questioning of Dorothy Phillips regarding the phone calls did not constitute prosecutorial misconduct.

B.

In addition, defendant argued that the prosecution committed misconduct in stating, "I mean the courtroom is not safe," thus, insinuating that defendant was dangerous and violent. Defendant did not object to this statement of the prosecution and, thus, the issue will be reviewed for plain error that affected defendant's substantial rights. *Carines, supra* at 763-764; *Rodriguez, supra* at 32.

A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). The prosecution did not specifically state that defendant was a threat or that anyone was a threat. But, rather, in context the prosecution was stating that the witness, Pennington, who later claimed that she was being threatened, would not feel comfortable going up to a blackboard, which was apparently close to defendant and the courtroom spectators. Although, this statement is questionable, it was brief and was not directly insinuating that defendant was threatening, but rather, that something or someone in the courtroom was not safe. Further, and most importantly, the evidence against defendant was overwhelming, and this statement by the prosecution did not result in the conviction of an actually innocent defendant, nor did it seriously affect the fairness, integrity or public reputation of judicial proceedings. *Schutte, supra* at 720. Three eyewitnesses testified that they saw defendant with a gun pointed at Jeffery Phillips and two of those witnesses claim that they witnessed defendant shoot Jeffery Phillips. The medical information supports the testimony of Pennington and Phillip Neeley with regard to how many times Jeffery Phillips was shot, and where he was shot. Moreover, no error requires reversal as any prejudicial effect of the prosecutor's comments could have been cured by a timely instruction if one was requested. See *Id*. at 721. Additionally, the jury was instructed on numerous occasions that the statements of the attorney's were not to be considered evidence. For the above reasons, there is no plain error affecting defendant's substantial rights with regard to the prosecution's statement the courtroom was not safe.

C.

Defendant also contends that the prosecution improperly elicited testimony from Jermaine Hart that he was contacted by the police who wanted him to identify some photographs. This line of questioning was not objected to by defendant and, thus, is reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764; *Rodriguez, supra* at 32.

Defendant seems to argue that the prosecution's asking Hart if he was asked, by the police, to identify defendant in photographs prejudiced defendant by making him appear as a criminal. This argument is without merit as the line of questioning actually indicates that the police were trying to identify who defendant was. There was no indication that defendant was criminal because the police department had photographs of him. But, rather, the prosecution

asked Hart "They [the police] didn't know what Mr. Bonner [defendant] looked like, correct?" And, Hart responded, "I guess not." If anything, this questioning suggests that the police were not familiar with defendant, he was not a criminal, and that the police were trying to identify exactly who defendant was through Hart. In addition, the jury was instructed that the questions of the attorneys were not to be considered evidence. Accordingly, there was no plain error regarding the prosecution's questioning of Hart regarding the pictures he reviewed. Furthermore, even if error, any prejudicial effect of the prosecutor's comments could have been cured by a timely instruction and, thus, there is no error requiring reversal. See *Schutte*, *supra* at 721.

D.

Next, defendant argues that the prosecution committed misconduct in eliciting prejudicial bad character testimony from Phillip Neeley, that defendant was a narcotics dealer. Defendant appears to be raising a mixed issue of prosecutorial misconduct and improper introduction of bad acts evidence. This issue is without merit as Phillip Neeley's response to the prosecution's question was not an elicited response. Specifically, the colloquial between Phillip Neeley and the prosecution went as follows:

*Q*. Did Mr. Bonner live there?

*A*. No.

*Q*. All right. So Mr. Bonner was just visiting?

*A*. That he was selling narcotics.

Defendant objected and the trial court indicated, in the presence of the jury, that the evidence was the witness's explanation of why defendant was present and that the jury should not hold the selling narcotics statement against defendant "in terms of determining guilt or innocence." [6]

Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *Starr*, *supra* at 496; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). Generally, a prosecutor must provide reasonable notice of his intent to present bad acts evidence. MRE 404(b)(2). Upon request, the trial court must provide a limiting instruction as to the use of the bad acts evidence regardless of whether the prosecutor or the defendant introduced the evidence. *Starr*, *supra* at 498; *VanderVliet*, *supra* at 75; *People v Ackerman*, 257 Mich App 434, 440; ___ NW2d ___

[6] We note that the trial court was supposed to instruct the jury as such, which it did not. However, we note that the message was adequately conveyed to the jury after the statement was made.

(2003). However, in the absence of either a request or an objection, a trial court is under no duty to give such an instruction sua sponte. *Rice (On Remand), supra* at 444. Even if properly preserved, error in the admission of bad acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). The defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred, *Knapp, supra*, and the evidence must be viewed in the light most favorable to the prosecutor, *People v Knox*, 256 Mich App 175, 195; 662 NW2d 482 (2003).

The prosecution did not elicit the statement from Phillip Neeley, as the answer was unresponsive to the prosecutor's question. Thus, upon a de novo review there was no prosecutorial misconduct with regard to the prosecutor's line of questioning that led to the revelation that defendant was selling narcotics in the area. In addition, with regard to bad acts evidence, the information was proper "opportunity" evidence as to why defendant was in the area of where the murder occurred, an area in which he did not reside. See MRE 404(b)(1). The evidence was highly probative as to why defendant was in the area he did not live in, and its probative value was not substantially outweighed by its potential for unfair prejudice. See *Starr, supra* at 496; *VanderVliet, supra* at 74. The jury was informed that they were not to consider the information for purpose of guilt and innocence, albeit briefly and not during jury instructions. Moreover, there is no error requiring reversal because it does not affirmatively appear that it is more probable than not that the error was outcome determinative. See *Knapp, supra* at 378. As such, upon a de novo review, we find that there was no prosecutorial misconduct or introduction of bad acts testimony that requires reversal with regard to the statement that defendant was selling narcotics.

E.

Defendant also argues that the prosecution committed misconduct when it tied the alias name "Watino Cann" to defendant because of a paper contained in an Indiana Sheriff's Department file without a proper foundation.[7] There was no objection to the referral to defendant's use of the alias "Watino Cann," and, thus, the issue is reviewed for plain error that affected defendant's substantial rights. See *Carines, supra* at 763-764; *Rodriguez, supra* at 32.

This Court has held that a defendant's use of an alias is relevant to his credibility. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997); see also *People v Pace*, 98 Mich App 714, 718; 296 NW2d 345 (1980). However, in *People v Thompson*, 101 Mich App 609, 613; 300 NW2d 645 (1980), this Court held that it is improper for a prosecutor to inquire about a defendant's use of an alias on some past, unspecified occasion as this would improperly permit an inference of nonspecific misconduct and, thus, could be highly prejudicial. The Court clarified that the use of an alias in connection with or in furtherance of some "specific ignoble purpose" might "be admissible under MRE 608 and MRE 609 to affect credibility," or "under MRE 404(b) as part of the prosecutor's case in chief in a false pretenses case, for example." *Thompson, supra* at 613-614.

[7] Issues with regard to flight evidence will be addressed, *infra*.

In the present case, the prosecutor only knew that on some unspecified past occasion the witness had used an alias, but did not offer evidence that defendant utilized the alias for the ignoble purpose of concealing his identity as the victim's assailant. But the testimony did establish that defendant was the person referred to as "Watino Cann" in the Indiana Monroe County Sheriff's Department documents. Here, defendant did not testify, thus, the use of the alias was not an attempt to impeach his credibility. See *People v Cueller*, 107 Mich App 491, 495-496; 310 NW2d 12 (1981). As in *Cuellar, supra*, the word "alias" was never mentioned at trial and the prosecution did not comment on this "alias" in either opening statement or closing arguments. See *Id*. at 496.

Even if referral to defendant's alias "Watino Cann" was error, it did not affect his substantial rights as it was not that inflammatory and was only briefly referred to. As was the case in *Thompson, supra*, on which defendant relies on appeal, any error in the prosecutor's questions was harmless because the questions regarding an alias were few and not inflammatory. *Id*. at 614; see also *Cuellar, supra* at 496. In addition, there was a substantial amount of evidence supporting that defendant shot Jeffery Phillips, including two eyewitnesses to the shooting, and a third witness who saw defendant with a gun pointed at Jeffery Phillips. Moreover, defense counsel adequately cross-examined the police officer so that the jury was informed that the officer was not aware of where the Indiana Sheriff's Department got the name Watino Cann. There was no plain error that resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. See *Schutte, supra* at 20. Furthermore, any prejudice could have been cured by an instruction, if requested and, thus, reversal is not required. *Id*.

F.

In addition, defendant raises various issues with regard to the prosecution's closing argument and rebuttal argument. Defendant contends that the prosecution unfairly denigrated defense counsel during rebuttal argument. Defendant did not object to the statements made during rebuttal argument and, thus, the issue will be reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764; *Rodriguez, supra* at 32. A prosecutor may not personally attack defense counsel, *People v McLaughlin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 234433, issued 9/25/03) slip op p 5, or the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *Watson, supra* at 245.

Defense counsel's closing argument referred to the prosecution coaching witnesses and a lack of evidence as he stated:

> This is a great, great, great job of coaching on all sides. A great job of coaching to make the story fits the facts.
>
> Prosecutor ain't bought any evidence here. . . . No evidence at all. None whatsoever. . . . No scientific evidence at all.

Then, in the prosecutor's rebuttal argument he made the following statements:

> Ever go to a magic show? Magic show, ladies and gentlemen. That's where a person does something very, very flowery with the right hand so they don't see what's happening in the left.
>
> Smoking mirrors. Misdirect. Look the other way. Don't look at what's in front of you. Don't look at what's right in front of your face. I gotta distract you.
>
> This counsel says there is no evidence ladies and gentlemen, the Judge is going to tell you when a person raises a hand, swears to tell the truth, sits in the chair and tells you what happened on a particular date and time, that is evidence.

The prosecution's statement was a proper response to defense counsel's closing argument. The prosecution need not use the blandest possible terms. See *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). In addition, the jury was instructed that arguments of the attorneys was not to be considered evidence. Moreover, any error could have been cured by a timely instruction. See *Schutte, supra* at 721. Thus, there is no plain error that affected defendant's substantial rights with regard to the prosecution allegedly denigrating defense counsel during closing argument. See *Carines, supra* at 763-764; *Rodriguez, supra* at 32.

Next, defendant argues that the prosecution went beyond fair argument regarding the impeached statements of Hart and impermissibly vouched and used impeachment evidence as substantive evidence. The statement at issue was:

> We've got three eye witnesses. We actually had four, but one tried to say he didn't see it now or he didn't say that. But even Mr. Jeffery Phillips [presumably the prosecution meant Phillip Neeley] said that Mr. Jermaine Hart was out there.

A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *Schutte, supra* at 721, but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *Bahoda, supra* at 282; *Schutte, supra*. A prosecutor may not vouch for a witness' credibility or suggest that the government has special knowledge that a witness testified truthfully. *Knapp, supra* at 382. However, where the jury is faced with a credibility question, the prosecutor is free to argue witness' credibility from the evidence. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment powers out of deference to those of the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352-353; 543 NW2d 347 (1995).

The challenged statements were proper arguing of the evidence. Phillip Neeley testified that he saw Hart outside when he witnessed defendant shooting Jeffery Phillips. Although, it would be improper to use Hart's statement to the police as substantive evidence, the prosecution may argue that Hart was an eye witness based on the testimony of Phillip Neeley, which would be substantive evidence. This conflicts with Hart's testimony that he did not see the murder and, thus, the prosecution was just arguing from the substantive evidence. Phillip Neeley testified that Hart was outside while the shooting occurred, and Hart testified that he was not outside and witnessed nothing. In addition, there was no impermissible vouching, but only proper argument regarding the credibility of the testimony. See *Knapp, supra* at 382. The prosecutor was not so

much vouching for Phillip Neeley as he was arguing that the evidence suggested Hart was not worthy of belief. Such an argument is proper. See *Launsburry, supra* at 361. Accordingly, there is no plain error that affected defendant's substantial rights see *Carines, supra* at 763-764; *Rodriguez, supra* at 32. And even if there was error it could have been cured by an instruction, if requested, and, thus, reversal would not be required. See *Schutte, supra* at 721.

G.

Lastly, defendant has not established that the cumulative effect of any of the alleged instances of prosecutorial misconduct deprived him of a fair and impartial trial. See *McLaughlin, supra* at slip op 6. Since any errors or irregularities during the trial were not of consequence, there was no cumulative error or irregularities that denied defendant a fair or impartial trial, nor was defendant prejudiced. See *Id*. Accordingly, the totality of the prosecutor's actions did not constitute reversible error.

IV.

Defendant's third issue on appeal is that there is plain error requiring reversal where there is a suggestion of flight without adequate foundation and then a failure to give an adequate cautionary instruction to the jury. We disagree.

Defendant failed to object to any suggestion of flight or lack of foundation, nor was a cautionary instruction requested. As such, the issue is not properly preserved for our review and, as previously noted, this Court reviews unpreserved claims of nonconstitutional error for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764; *Rodriguez, supra* at 32. Ordinarily, an objection to evidence or argument should be accompanied by a request for a curative instruction. See, *People v Harris*, 158 Mich App 463, 466; 404 NW2d 779 (1987); *People v Hayward*, 127 Mich App 50, 59; 338 NW2d 549 (1983).

In his opening statement the prosecutor stated "And you are going to hear, ladies and gentleman, that Mr. Bonner fled the jurisdiction. And if you are wondering why this case is so old is because he fled the jurisdiction you will hear." Later, during the testimony of Detroit Police Detention Officer LaSalle McCants, evidence was entered that Transcorp, a private transportation agency that picks up people and brings "them back on extradition warrants brought in [defendant]." Officer McCants indicated that there was a warrant out for defendant's arrest.

The general admissibility of evidence regarding defendant's flight to prove consciousness of guilt is well established. See, e.g., *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001), citing *People v Cammarata*, 257 Mich 60, 66; 240 NW 14 (1932); see also *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); *People v Cutchall*, 200 Mich App 396, 398-401; 504 NW2d 666 (1993). Although evidence of flight may not be used as substantive evidence of guilt, *People v MacCullough*, 281 Mich 15, 29; 274 NW 693 (1937); *People v Cismadija*, 167 Mich 210, 215; 132 NW 489 (1911), it is admissible, relevant and material and may lead to an inference of guilt. *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927), *People v Kyles*, 40 Mich App 357, 360; 198 NW2d 732 (1972). "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *Coleman, supra* at 4.

Defendant's primary concern with the admission of the evidence was that it tended to weaken his credibility before the jury and he argues that there was not a proper foundation to introduce it into evidence. The prosecutor was entitled to comment on the flight evidence as it is a reasonable inference arising from the testimony that a warrant was out for defendant and that he was picked up by Transcorp, a private company that picks up and delivers individuals on extradition warrants. *Bahoda*, supra at 282; *Schutte, supra*.

Opening statement is the appropriate time to state the facts that will be proven at trial. When a prosecutor states that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and the defendant was not prejudiced by the statement, *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). The prosecution's opening statement was supported by the testimony of Officer McCants and the reasonable inferences that may arise from his testimony. See *Bahoda, supra* at 282; *Schutte, supra*.

Upon a review of the record, we find that evidence of defendant's flight is relevant, material and admissible because it could give rise to an inference of guilt. See *Cammarata, supra* at 66; *Kyles, supra* at 360. Additionally, evidence of flight was also admissible because it was probative of defendant's consciousness of guilt. *Compeau, supra* at 598; see also *Cutchall, supra* at 399-401. Accordingly, the evidence of defendant's flight was relevant, not unduly prejudicial, and, as such, admissible. Even if the statement made during opening statement was improper it did not affect defendant's substantial rights and, thus, reversal is not required. See *Carines, supra* at 763-764; *Rodriguez, supra* at 32. The statement by the prosecution was brief and did not make a difference in the outcome of the proceedings. As for an instruction, defendant did not request an instruction and, thus, cannot argue before this Court that the trial court erred in failing to give a cautionary instruction. See *Harris, supra* at 466.

V.

Defendant's next issue on appeal is that he was denied a fair trial and his right to confront his accuser was violated where the trial court limited cross-examination. We disagree. The constitutional right for a defendant to confront his accusers is reviewed de novo. See, generally, *Lilly v Virginia*, 527 US 116, 118; 119 S Ct 1887; 144 L Ed 2d 117 (1999); *People v Smith*, 243 Mich App 657, 681; 625 NW2d 46 (2000).

"The scope of cross-examination is within the discretion of the trial court." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). "Neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to crossexamine on any subject." *Cantor, supra* at 564. Cross-examination may be denied with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues. *Id*. While the trial court is entitled to control the proceedings in its courtroom, it is not entitled to do so at the expense of a defendant's constitutional rights. *People v Arquette*, 202 Mich App 227, 232; 507 NW2d 824 (1993). "The Sixth Amendment right of confrontation is subject to a balancing test involving other legitimate state interests in the criminal trial process, including avoiding, among other things, harassment, prejudice, confusion of the issues, safety of the witness, or interrogation that is repetitive or only marginally relevant." *People v Byrne*, 199 Mich App 674, 679; 502 NW2d 386 (1993).

Defendant contends that the trial court infringed on his right to confront the witnesses against him. We find that defendant was not denied his right of confrontation or cross-examination. The following exchange occurred during defense counsel's examination of Pennington:

> *Q.* At the time of this incident on February the 26th of 1997 thereabouts had you been using drugs?
>
> MR. WAGNER: Objection.
>
> THE COURT: Well, what would be the relevance of that, Mr. Harris?
>
> MR. HARRIS: The relevance, your Honor, is, one, depending upon the answer, your Honor, might question what she really saw.
>
> THE COURT: Well, was she under the influence of drugs or alcohol at the time she made her observation that she's testified about, okay, I'll allow that.
>
> MR. HARRIS: Correct, your Honor.
>
> THE WITNESS: No, I wasn't.
>
> *Q.* (By Mr. Harris, continuing): You were not?
>
> *A.* No.
>
> *Q.* Have you used - -
>
> MR. WAGNER: Objection. Now, that's not relevant.
>
> THE COURT: I'll sustain that objection.

The trial court properly handled the situation by allowing testimony which directly was relevant to Pennington's perception of the events that occurred with regard to the shooting of Jeffery Phillips, but, properly, denied defense counsel an opportunity to cross-examine on a collateral matter bearing only general credibility and on an irrelevant issue. See *Cantor, supra* at 564. Whether Pennington has used drugs before is only marginally relevant to her credibility. For the above reasons, the trial court did not abuse its discretion in limiting the cross-examination of Pennington with regard to general drug use when it allowed her to testify regarding whether she was under the influence at the time pertinent to her testimony.[8] *Cantor, supra* at 564.

[8] Even if we had concluded that the trial court abused its discretion by limiting cross-examination of Pennington, the error was harmless beyond a reasonable doubt, as there was overwhelming evidence of defendant's guilt and because defense counsel adequately attacked the credibility of Pennington. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (continued…)

VI.

Defendant also argues that he was denied his right to effective assistance of counsel where his attorney failed to seek a cautionary instruction regarding flight and failed to object to various acts of prosecutorial misconduct. We disagree.

When reviewing defendant's claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *Rodriguez, supra* at 38. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id.* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The deficiency must be prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Daniel, supra* at 58.

A.

Defendant argues that there was no strategic reason why defense counsel would not object and at least request a cautionary instruction with regard to the flight evidence. We disagree, as it could been strategy not to want the issue even raised again before the jury or to call the jury's attention to the evidence. The statement regarding flight was brief in the prosecution's opening statement, and the testimony from Officer McCants was vague as to a flight by defendant. Thus, the issue of defendant's flight was not significantly raised in front of the jury, and defense counsel may have been using sound trial strategy in not bringing the issue up during jury instructions or by not objecting. See *Rice (On Remand), supra* at 444-445.

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(…continued)

(1998).

The failure to request a cautionary instruction is considered trial strategy and, therefore, it is an inappropriate basis for claiming ineffective assistance of counsel. See *Id*. Defense counsel may have determined that requesting a cautionary instruction would have highlighted the evidence and, accordingly, he may have decided not to request such an instruction. Such a strategy would not be unsound. See *Id*. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). In addition, as noted, hereinbefore, the comment on flight was not error, and, thus, an objection would have been meritless. See *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "A trial attorney need not register a meritless objection to act effectively." *Hawkins, supra* at 457. Therefore, defendant has not overcome the presumption that he received effective assistance of counsel. See *Daniel, supra* at 58.

B.

With regard to the statements made by the prosecution, the majority of the statements were not improper. Thus, objections would have been meritless. "A trial attorney need not register a meritless objection to act effectively." *Hawkins, supra* at 457. As such, defense counsel was not ineffective for failing to object on these occasions where it would have been meritless. Further, as noted, hereinbefore, any statement by the prosecution that may have been improper did not prejudice defendant. See *Daniel, supra* at 58. As such, defendant was not prejudiced by any of the prosecution's comments, and defendant has failed to establish ineffective assistance of counsel. See *Bell, supra*.

Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *LeBlanc, supra* at 579.

VII.

Defendant's final issue on appeal is that the trial court erred by excusing a juror during the trial for no sufficient basis. We disagree. A "trial court's determination of a juror's ability to render an impartial verdict is reversed only where an appellate court finds a clear abuse of discretion." *People v Johnson*, 103 Mich App 825, 830; 303 NW2d 908 (1981); see also *People v Benny Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). Reviewing courts give great deference to the superior ability of the trial court in matters relating to credibility. *Benny Johnson, supra* at 256.

The trial court clearly, considered the circumstance that the juror could remember personal information about the witness and to "be as absolutely careful as we should" the trial court decided to excuse the juror. There is a possibility that the juror, who had collected information, for Supplemental Social Security Income (SSI), from a witness could have been influenced by the personal information. The juror indicated that he would observe an individual for truthfulness, and make a recommendation for SSI based on the observation. The trial court was concerned that the juror may have already made decisions regarding the truthfulness of a witness prior to the trial. Since there were two alternate jurors the trial court decided that the

safest route would be to dismiss the juror. The trial court did not abuse its discretion in excusing the juror. See *Johnson, supra* at 830.

VIII.

Defendant was entitled to a fair trial, not a perfect trial. See *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). There was no error requiring reversal.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey